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ABSTRACT

This publication contains statements from panelists at a seminar exploring recent campus conflicts over whether Christian student groups can bar gay and lesbian students from positions of leadership. The discussion centered on the decision of the Tufts University student judiciary to "derecognize" the Tufts Christian Fellowship (an affiliate of InterVarsity Christian Fellowship) because it refused to consider for leadership a member who rejected the group's belief that the Bible prohibits homosexual practice. The five seminar panelists were David A. French, Patricia M. Logue, Stephen Macedo, Chai R. Feldblum, and William A. Galston. (EV)

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Conflict on Campus: Religious Liberty versus Gay Rights?

At a seminar in Washington on June 13, 2000, the Ethics and Public Policy Center joined with the Civitas Program in Faith and Public Affairs of the Center for Public Justice to sponsor a free-wheeling discussion of recent campus conflicts over whether Christian student groups can bar gay and lesbian students from positions of leadership. The discussion centered on the decision of the Tufts University student judiciary to "derecognize" the Tufts Christian Fellowship (an affiliate of InterVarsity Christian Fellowship) because it refused to consider for leadership a member who rejected the group's belief that the Bible prohibits homosexual practice. Similar cases have arisen at Middlebury, Grinnell, Whitman, and Williams colleges. (The Supreme Court case mentioned several times in this Conversation, Dale v. Boy Scouts of America, was decided two weeks later, on June 28: the Court affirmed the organization's right to expel an adult Scout leader because he is gay.)

The five seminar panelists were David A. French, Patricia M. Logue, Stephen Macedo, Chai R. Feldblum, and William A. Galston. They will be identified at the start of their remarks. The moderators were Elliott Abrams, president of the Ethics and Public Policy Center, and Keith Pavlischek, director of the Civitas Program.

Elliott Abrams: In the last several months there have been clashes on a number of campuses involving evangelical Christian student groups and their claims to have the right to exclude gay and lesbian students, not from participation in the groups, but from leadership positions. College administrations feel they must uphold policies that protect homosexual students from discrimination. Evangelical students claim that their actions are not discriminatory but are based on religious beliefs that they have the right to express. Who is right? Which rights are to be protected? Years after the nation last looked hard at whether the right to private association could be a cover

for discrimination instead of a protection for fundamental liberties, we must do so again. It is the central issue not only in these campus clashes, which are certain to multiply in the coming academic year, but also in the Supreme Court decision in the Boy Scout case.

We will begin with two of the lawyers on the panel, Mr. French and Ms. Logue, and then move on to Mr. Macedo, Ms. Feldblum, and Mr. Galston.

I. David A. French

David A. French is a lecturer at Cornell Law School. His law practice has emphasized church-state issues and free speech, and he represents the Tufts Christian Fellowship in its dispute with the university.

I want to begin by describing exactly what happened at Tufts. About three years ago a young woman who had joined the Tufts Christian Fellowship (TCF) informed the leaders that she was struggling with her sexual orientation. She said that she believed what the Bible says about homosexual practice and wanted to conform her life accordingly, and she asked for prayer and for help in understanding the issue in light of her faith in God. She became a valuable and beloved member of the fellowship and assisted in leading Bible studies. By this April—near the end of her junior year—she was a potential candidate for senior leadership.

Tufts Christian Fellowship, like many other religious and secular organizations, is not a democracy. There is no election, no slate of candidates to be voted on by the group. Instead there is an appointive process in which the outgoing leaders assist in choosing the leaders for the next year. During that selection process, this young woman told the leaders of the fellowship that while she still believed that the Bible was the absolute word of God and wanted to order her life accordingly, her interpretation of

certain scriptural passages had changed. She now believed that a practicing homosexual lifestyle, within the context of a long-term monogamous commitment, was acceptable under biblical standards. She wanted assurance from the fellowship that her changed position would not be considered in her application for senior leadership. But instead she was told that her change of view *would* be considered.

She then drafted a one-paragraph complaint to the Tufts student judiciary, alleging that she had been discriminated against on the basis of her sexual orientation. The student judiciary asked Tufts Christian Fellowship to respond. The leaders of TCF dashed off a one-page response and then prepared to defend their action in the open hearing that the student had requested. At 10 p.m. on Thursday, April 13, the student judiciary held a surprise meeting without informing either TCF or the complaining student. At that meeting, which lasted approximately an hour, the student judiciary decided to "derecognize" Tufts Christian Fellowship and immediately

revoke all its privileges. Derecognition meant that TCF would lose its funding from the student activity fee (about \$5,700 per year) and would lose the right to meet on campus, to advertise on campus, to use the Tufts name, and to participate in

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the annual activity fair that lets incoming students know what kinds of organizations exist on campus. When asked to clarify what a derecognized group could and could not do, an administration official told TCF representatives, in essence, that "as far as Tufts is concerned, you no longer exist." TCF immediately retained counsel—me—and began the appeal process.

The university appeal process doesn't allow for an appeal on the merits; in other words, we could not say that the judiciary made the wrong decision substantively. Appeals are permitted only on procedural grounds. We made such an appeal, arguing that a late-night meeting held without notice and without giving the two sides an opportunity to be heard does not satisfy even the most basic notion of due process. After some deliberation the Committee on Student Life, which is the appellate panel, agreed and reversed the decision of the student judiciary. This decision did not extinguish the underlying complaint. It means only that TCF is, for the time being, reinstated and that the issue is remanded to the student judiciary for a proper procedural decision on the merits.

So with the procedural wrangling out of the way, we

are now looking at the heart of the issue, which has often been phrased as religious liberty versus gay rights. Many people have said that what we have here is a case of tolerance versus intolerance, and that the discriminatory point of view that TCF holds—however distasteful or hate-filled it may be—is part of the price we pay for having a free society. I differ from that position. This is not the Nazis marching in Skokie. These students are not bigoted, are not hate-filled, are not homophobic. But they have a worldview fundamentally different from the worldview of many others in the university.

Let's look at how the Tufts Christian Fellowship made its decision in this case. When the student asked to be considered for leadership and stated her changed views with regard to sexuality, the leaders of the fellowship did the following things. First, because they believe that the Bible answers the questions of life, they had four two-hour meetings of Bible study and prayer. Next, knowing that in the Christian community there are differing interpretations of the relevant biblical passages, they invited the university's Protestant chaplain, who believes that homosexual practice is not inconsistent with scripture, to talk to them. She spoke for about an hour. They then invited a more conservative theological voice, representing the view that homosexual practice *does* violate biblical standards. That person too spoke to them for about an hour. After that, they had a time of personal meditation, prayer, and Bible study. Then they made the decision that was the hardest one for them to make, both because this student was their friend and because they had some idea of the price they would pay for excluding her from leadership.

Let's contrast that with the decision-making process of the Tufts student judiciary. There was a meeting of about an hour in which there was very little deliberation. There was certainly no notion of hearing from both sides. The decision was immediately endorsed by the acting dean of students, in very firm language, in the Tufts student newspaper. Given the approach taken by TCF and the approach of the student judiciary, which one smacks of intolerance?

Regardless of who was initially intolerant, we are now left with two worldviews in opposition. The Christian position says that there is a God-given ideal of human behavior, and that we as human beings and as a society function at our best when we are trying to fulfill this ideal. While we can't ever achieve it completely, as imperfect human beings touched by the transforming grace of God we can at least come closer than we did when we started. Set against this is the idea that we as human beings have differing desires and differing ideas about life, and as long as they don't infringe upon the autonomy of another human being, we should be free to

carry out these various ways of defining ourselves. In this view, there isn't an ideal of human behavior—unless it is the principle of being tolerant of the differences of others.

Plainly, this is a situation not of hate versus tolerance but of two fundamentally different ways of looking at the world. Tufts Christian Fellowship, like groups experiencing similar problems on other campuses, is not asking that the university endorse its views, or appoint some professors who share its views, or offer classes teaching its views. These students are asking only for the right to form a group, to meet in some empty classrooms, and to hang up their flyers next to ads for IMF protests and fraternity keg parties. They are asking for the simple right to meet as a community of believers and to participate in the marketplace of ideas.

The ramifications of decisions like those being made at Tufts, Grinnell, and Middlebury extend beyond having a few small Christian student groups wither, or driving a few Christian students away from the secular university. If the same standards are applied to other religious groups, then Orthodox and Conservative Jewish groups, Catholics, Orthodox Christians, Muslims—over time they too will be denied a place at the table. This is not an insignificant number of people; it's a huge swath of Americans being denied the most basic freedoms at private secular institutions.

But the danger doesn't stop there; it extends to the notion of liberty itself. Liberty is often said to be fragile. I think that's very true, particularly in the private context, because the Constitution does not protect persons who are students at private schools or employees of private corporations. Freedom in those settings is indeed fragile. We're in an interesting time in the life of our nation in which a large group of people who twenty-five or thirty years ago were the voices of dissent now occupy positions of power. In many ways that is a good thing. But it is not a good thing if the former dissenters, now in positions of power, use that power to constrain the liberty of others. In essence, such behavior is a declaration to the world that "we will occupy this seat of power indefinitely; we will never again need the means of dissent we used to gain this power in the first place." I think that view is short-sighted and dangerous. The measure of a movement is not how it behaves when its power to impact the lives of others is minimal but how it behaves when it holds the reins of power.

2. Patricia M. Logue

Patricia M. Logue is the supervising attorney of the Midwest Regional Office of Lambda Legal Defense and Education Fund, a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, and people

with HIV/AIDS. She co-authored the brief for the gay man excluded from Scout leadership in the Supreme Court case Dale v. Boy Scouts of America.

Let me start by saying that Lambda, the organization I work for, has not taken a position on the Tufts case or any of the similar cases. My remarks here should not be misconstrued as an official position of any kind. The issue is a very complicated one. I would certainly agree with David French that there isn't much evidence of hate in the motivations of Tufts Christian Fellowship and similar groups. But we know that even benignly motivated actions can have very harmful consequences. A lot of harm can be inflicted by the exclusion of gay and lesbian high school and college kids from opportunities open to their peers.

I am certainly sympathetic to the procedural due-process arguments that David French outlined, and maybe to some of the substantive ones as well. It is an area where visceral reactions are ultimately not very helpful. I come to this as a strong supporter of both equality principles and free-speech principles, not only because I work at Lambda but because, with both my parents political scientists and one a journalist as well, I have had a life-long indoctrination in these principles. Certainly at Lambda there is a deep understanding that the principles of free speech and free association are the source of the strongest protection gay and lesbian people have, so it's not our desire to chip away at these principles in any way. Of course, equality is a cornerstone of our movement, with non-discrimination laws being an important part of that. The Tufts case is just one example among many where the equality and free-speech principles come into conflict; *Dale v. Boy Scouts* is another.

This is a very complex case in which there are no First Amendment claims because there is no governmental discrimination. Nowhere in these cases of student religious groups is the government involved in abridging freedom of speech or the free exercise of religion. What we have instead is one private institution in conflict with another. In the example we are discussing, it is Tufts University versus Tufts Christian Fellowship.

I think the first question is, at what level are we going to apply the relevant principles, including the right of private associations to determine for themselves what they believe? We can start at a sort of micro-level, as Mr. French has with Tufts Christian Fellowship, or we can start at a macro-level, with Tufts University. Whose private views get to rule the day? If you sound the alarm for the freedom of Tufts Christian Fellowship and its beliefs, do you sound an equally loud alarm for Tufts University and the principles that it may want to organize around? Do we want to rule that a private university can impose no litmus tests,

no base-line principles? For example, if an evangelical Christian college believes—and I would say, of course, contrary to all good science—that homosexuality is a condition that can and should be cured, can it refuse to lend its name and dollars to a group called Future Psychiatrists Against Reparative Therapy? Does that school have to let the anti-reparative-therapy view not only be heard on campus but also subsidized with its money and facilities, and allowed to use the school's name? Likewise, if a school believes—as I, who was raised in a Catholic family, do—that there is no sound theological basis for claiming that homosexual love is immoral, and, moreover, that it is not just wrong but distinctly harmful to the personal safety and mental health of young people to embrace such a view, can the school withhold its name and support from organizations that take the opposite view, be they benignly motivated or hatefully motivated?

Labels such as "private" or "religious" don't really decide the issue. Nor is it clear what the result would be if you treated Tufts like a state actor. We might analogize, for example, to the Bob Jones University case (*Bob Jones University v. United States*, 1983), where the federal government was allowed to withhold a tax exemption from the university on the grounds

"Who gets to draw these lines? Does Tufts Christian Fellowship get to distinguish between orientation and behavior, or does Tufts University get to say what it means by its anti-discrimination law?"

that racial discrimination in education is against public policy. If a private university has comparably strong beliefs about discrimination on the basis of sexual orientation, isn't it entitled to deny similar sorts of subsidies on its campus? A related analogy might be to the 1991 case *Rust v. Sullivan*. You might argue that it is right for the government to condition the granting of government money on adherence to its view that abortion is not an acceptable method of family planning. It is, after all, the government's money. Well, this is Tufts's money. Does Tufts get to impose any conditions on the granting of it?

The recent *Board of Regents v. Southworth* case is another way to think about it, and I think the principle is a useful one: if the government sets up a viewpoint-neutral public forum composed of money for student group activities and expression, then the groups within that forum must receive that money on a viewpoint-neutral basis, and students can be forced to contribute to the forum. This supports a strong belief that I hold and Lambda holds, that more speech is generally better, that the cure for bad speech is more speech.

I think it is worth pointing out, though, that in *Southworth* it was evangelical Christian groups seeking

to de-fund campus gay and lesbian groups. They claimed that there was no equivalence between a loss of funding and a loss of free speech, that it was okay to subject unpopular viewpoints such as those of the gay groups to a popularity contest, and that they weren't advocating censorship but merely defending their own strongly held private beliefs. Now we are told the opposite, that for a Christian student group at Tufts to lose funding based on Tufts's beliefs is a loss of free speech and religious freedom. This is, I think, a principle that I can agree with, but I think it is important to say that the alleged desire to censor is not limited to one side in these conflicts.

If *Southworth* is offered as the guiding principle for a university like Tufts, I think you get to the next level of the issue: whether a university (whether public or private) can impose a non-discrimination principle on student groups and still maintain that it is operating a viewpoint-neutral forum. To some extent, that might be the harder question. *Rosenberger v. University of Virginia* (1995) demands that public universities give funding from a student-fee forum on a viewpoint-neutral basis to religious student groups on campus. Yet most public university forums also have non-discrimination rules for the campus groups allowed access to rooms and funding.

So who gets to define what is a "viewpoint" about homosexuality? How do you define sexual orientation? Is it legitimate to draw these lines between sexual identity and sexual conduct that TCF is drawing, and that we too draw in some contexts? In other places the two are merged—as in the "don't ask, don't tell" policy, in which the government says that "if you say, 'I'm gay,' we're allowed to assume that you think homosexuality is moral and that, in fact, you are going to engage in homosexual conduct." So it's a big issue: who gets to draw these lines? Does Tufts Christian Fellowship get to distinguish between orientation and behavior, or does Tufts University get to say what it means by its anti-discrimination law? The Supreme Court has repeatedly held that there is no constitutional protection for discrimination, that the right of association doesn't give you a right to discriminate. Obviously, the Court doesn't mean that in a fully literal sense; it means that there are limits to the claim that the government must allow you to associate in order to express discriminatory ideas and must allow you to engage in discriminatory conduct, such as the exclusion of some from the opportunity to seek a leadership role in an organization.

Having said all that, I think the case as David French presents it is a difficult one. What you have, as he presents it, is someone who wants to be a senior leader of an organization that firmly believes that the Bible condemns homosexuality, but who rejects that belief. If you accept the case on those grounds, it is a strong case for the

organization and for seeing its position as an internal policy matter.

But let me express some general concern about the invocation of the First Amendment or analogous expressive-association claims, and about the ways in which such claims are sometimes used as a pretext for discrimination, particularly identity-based discrimination. One concerns the raw discrimination that can occur when a few people dress up a belief as shared ideology. It might take the form of a group shifting—as some people have alleged happened in this case—from one where everyone can come in with her or his own view of what the Bible means and engage in open discussion of this, to a group that suddenly says, the Bible means thus and so, and if you don't agree with this view, you're out. I frankly don't know which kind of group the Tufts Christian Fellowship is.

Another way to engage in identity-based discrimination is to dress it up as conduct-based. "It's not that you're black; it's that you want to marry a white person." "It's not your race that we care about; it's the fact that you want to live out a fully human existence as a black person." "It's not that you're gay; it's that as a gay person you want to have a full human experience that other people take for granted."

Another is to base assumptions about behavior on identity, which is something the military is doing: I'm gay, and therefore you the military assume that I am not capable of complying with the military law even though you assume that heterosexual soldiers—also barred from having oral sex—will comply with that law. You make assumptions based on my identity and you call that non-discrimination.

Another way is to exclude dissenting views only when they are held by people you don't want in your organization. This is something that we accuse the Boy Scouts of doing. The Scouts essentially say, "Heterosexuals who hold the view that homosexuality is not immoral are welcome to be in the Scouts; we trust *them* to express the message of Boy Scouts consistently. But homosexuals who hold this same view cannot be in the Scouts, and we justify that discrimination on the basis of our shared beliefs." Well, which is it? Is it your shared beliefs that you don't want anyone, including heterosexuals, to undermine? Or is it the fact that you don't want gay people involved in your organization?

Again, these points aren't necessarily answering any of the Tufts questions but only complicating them. What were the views that brought the Tufts Christian Fellowship together? Have those views changed? Are the members of one mind about the morality of homosexuality? Or has this year's group of leaders put a spin on what the organization is about?

I also want to say something about the notion of leadership. This was something that came up in *Dale v. Boy Scouts*, where the Scouts refer to all adult members as "leaders," meaning teachers of youth. We tried to help the Court distinguish that from policy-making leaders. But in this case we are talking about a "senior leader," who presumably has the ability to influence what the mission and beliefs of the organization are. I am troubled by the idea of not letting groups freely choose their own senior leaders based on viewpoint. I guess the mirror image would be the take-over of gay groups by evangelical Christians opposing gay rights. It is a great loss to set up a system where any outsiders can come in to make the original group go away because they don't like its views—a kind of hostile-take-over theory of equality. I don't think that is going to get us far. The question would really be, Can a senior leader in this organization make a change in what the organization's members truly have come together to express? If so, that's a very serious consideration.

And I would also ask whether the policy is being applied consistently. Are there heterosexuals in this group, for example, who are engaging in premarital sex but are allowed to become leaders, even though sex outside marriage is considered sinful? Or, when Julie Catalano crossed the line from struggling with the issue to making a declaration that was inconsistent with the group's position, was that what changed things? Would that have been the appropriate point at which to say, "You know what, we're here to express the belief that homosexuality is immoral. That's why we came together, and so we're asking that you go out and form your own more inclusive organization."

But even if you were to think that these considerations favor the TCF side, you would still have to ask whether the university was driven by some interest—in the First Amendment context we'd be talking about "compelling" and "substantial"—strong enough to outweigh whatever it was that Tufts Christian Fellowship wanted to espouse. Again, for me the principle is that more speech is better speech, and if there is doubt, I would come down on the side of more speech rather than on the side of censorship. The fear of undesirable speech should not be allowed to overwhelm the value of unfettered expression. Gay people understand that as well as anyone else. I'm just not sure that it is proper to look at this solely from the standpoint of Tufts Christian Fellowship and ignore the equally great right of Tufts University to decide why it came together and what views it wants espoused on its campus.

"For me the principle is that more speech is better speech.... The fear of undesirable speech should not be allowed to overwhelm the value of unfettered expression."

3. Stephen Macedo

Stephen Macedo is Laurance S. Rockefeller Professor of Politics at Princeton University and the University Center for Human Values. His critique of the conservative stance on sexual morality, "Homosexuality and the Conservative Mind" (Georgetown Law Journal, December 1995), won the 1997 Fred Berger prize of the American Philosophical Association.

I want to come back to some issues that Patricia mentioned, but first a couple of preliminary remarks. I personally believe that these religious groups that condemn homosexual conduct as always and intrinsically sinful are on the wrong side of history. You may think, "Well, so much for history!" But these views are not in the ascendancy and will continue to be on the defensive, and that's a good thing. It also seems to me that attempts to provide reasoned arguments for the proposition that homosexual conduct is always and intrinsically immoral are inadequate and unconvincing. I have tried to examine conservative moral arguments sympathetically and carefully, and I have argued about this with my Princeton colleague Robert George and with Amherst professor Hadley Arkes. I have a lot of respect for these people and I regard them as reasonable, but I think they fail to make reasonable arguments on these matters. I look forward to the day when the Boy Scouts of America welcomes gay Scouts and gay Scoutmasters and when the Saint Patrick's Day parade welcomes openly gay Irish groups, and I'm sure that day will come. I even look forward to the day when the Roman Catholic Church blesses gay marriages, but I'm not holding my breath on that one.

These are my views, but they are not the proper grounds for defining the limits of free speech, or the limits of student expressive associations on campuses. I agree with Patricia that First Amendment rights can be found on both sides of this issue. Private colleges should stand for particular values—the values properly associated with the ideal of a liberal education—and if they respect the right to free speech and support associative expression of the sort at issue at Tufts, it doesn't mean that they have to be neutral about debate of this sort. In fact, it seems absolutely crucial to me that, along with supporting free-speech rights and along with allowing a portion of the student activity fee to go to these evangelical organizations, private colleges should also take a stand against these religious groups' restrictive views on homosexuality. There is no inconsistency between defending the right of these student groups to organize and get student-activity funds to advocate for their views, and the university's continuing to take a stand for inclusion and against positions that in my opinion are based on unrea-

soned prejudice and on age-old discrimination against homosexuals.

I presume that all these colleges provide health care and other spousal benefits to committed same-sex partners of faculty and other employees. In doing so, it seems to me, they dramatically and practically take a stand against the restrictive views of these campus groups. When colleges and universities provide spousal benefits to the partners in same-sex couples but not to the domestic partners of heterosexual employees, as many of them do, they are taking a position against the unfairness of excluding gays from the benefits of society's recognition and encouragement of stable, long-term relationships via marriage. It seems to me exactly the right stand.

Now, I also think that it's wrong to portray these cases as simply instances of discrimination against Christians or persecution of them because of their religious beliefs, as some of the news reports have done. University administrators should not decide to carve out for religious groups an exception to anti-discrimination regulations. The same rules should apply to all. I think we should be extremely leery of extending special rights to religiously grounded student expressive groups. At the same time, I certainly want to add my voice to those who would urge on private college administrators the virtue of respecting the rights of Christian students and others, subject to certain provisos, to form and maintain student groups that propagate the view that homosexual activity is sinful, immoral, intrinsically inferior to heterosexual activity.

Now, I say "subject to certain provisos" because I do think there are some legitimate concerns on the other side. It may be possible to formulate a policy that respects expressive freedom while also promoting a willingness on the part of students to engage in respectful, reasoned debate with an attitude of openness to change on the basis of better arguments. These are among the virtues that a liberal education should promote. I think that is where the exclusion of people from leadership positions based on their desire to revise the substantive commitments of groups comes into question.

With respect to these cases, I certainly am struck by the civility and apparent decency of these evangelical student groups. They welcome gay members but bar them from positions of leadership. The exclusion applies not just to gays but to any member who fails to espouse and practice the core beliefs of the group. I agree with David French that these are not hate groups; they are not singling out homosexuals in an obviously egregious way; they are sincerely upholding historically and communally rooted religious and moral convictions.

The question for private colleges is: What rules should govern voluntary student groups in order to promote the

overall aims of a liberal education? The university can and should take a stand for particular values, while recognizing the important role of student-initiated debate and contestation. That is one of the glories of a lively university environment: students participate in a rich proliferation of groups arguing for all kinds of things, some of which university administrators know or strongly believe to be wrong. That's part of what it means to maintain a liberal, open forum.

Recall the wonderful argument for the freedom of speech made by John Stuart Mill, who advocated the benefits of contesting even true beliefs. Advocates of equal acceptance for gays may not have the whole truth on their side. Even if they do have the whole truth, lack of contestation will encourage them to become complacent, lazy, arrogant, ignorant of the views of opponents. That is a real danger on some college campuses; some are indeed characterized by a sort of mind-numbing liberal complacency. And conservative views on these matters certainly need to be drawn into reasoned conversation, not shunted aside. If the truth is to become widely disseminated, if it is to become pervasive in society, then arguments on both sides of these matters need to be engaged on university campuses.

Many advocates of equality for gays do have something to learn from advocates of traditional sexual morality about the dangers of a totally demoralized sexual liberationism. It sometimes seems that conservatives are the only ones who realize—or perhaps they realize it more dramatically than others—that sex is an aspect of life that is subject to moral judgments. It is good for society to do what it reasonably can to tilt in the direction of long-term fidelity and commitment. Of course, these convictions themselves need to be contested and argued about. So the classic John Stuart Mill type of argument seems to work very well as the basis for arguing that these conservative views should be part of the debate on college campuses.

But even if we accept Mill's basic view, we are left with some concerns. Patricia has pointed to a few of these. There are some differences among these cases; the details matter. As far as possible, it would be good if the rules that govern these matters were sensitive to such differences. I agree with Patricia that it makes a difference whether people are being excluded from a group based on status or based on behavior. Certainly it is wrong to exclude people on the basis of an unchangeable status. We shouldn't take the fact of a homosexual inclination as a surrogate or a proxy for a person's views. Has the person simply announced a homosexual inclination? Has the person committed homosexual acts? If so, does that mean he or she condones homosexual acts, or not only condones homosexual acts but also advocates revision of attitudes towards homosexuality within the group?

All these things matter. At Middlebury, a student had his name stricken from the ballot simply because he announced his belief that homosexuality is acceptable to God. These complexities point to a deeper and fundamental problem: Is it proper on a liberal arts campus to allow a person's name to be taken off the ballot because he would like to revise the content of what the group stands for? I would like to see the rules crafted in such a way as to allow groups the freedom to define their views, but not allow them to arbitrarily exclude members from contesting leadership positions.

Now, this is difficult. I'm not sure that such rules can be devised. I do think we can allow private campuses more leeway, more room for discretion, than we allow the government. We should be extremely distrustful of the government regulating speech, but for private colleges to do this is a different matter. One kind of distinction that could be made is that a person who wanted to stand for office as a leader

within a particular group would have to have been a member in good standing for a certain period of time, but not a subscriber to a particular fixed set of beliefs. If a university were to require this, then it would be insisting both that student-

run groups, which are funded by a student activities fee, should be run by the current students, and that the mission of the group should be open to revision, criticism, and contestation by the current student members. That would help inject a kind of liberal self-criticism and openness to revision into recognized and funded student groups. Administrators could insist in this way that student groups have a broad right to organize and to advocate particular views on questions of politics, sexual morality, gender, and the like, but that the substantive commitments of the groups should be debatable, contestable in elections, and revisable as a consequence of the group's deliberations and elections. This would protect student diversity while encouraging self-criticism within the group—certainly a liberal educational value.

Now, as Patricia said, there is a danger of a hostile takeover; this should be taken into account. But while a takeover from *without* is indeed a danger, a change from *within* is not. When a group of students, as a consequence of discussion and deliberation, changes its views from *within*, that should be seen as a positive thing. If the Middlebury student decides, upon due reflection, that the

"Advocates of equal acceptance for gays may not have the whole truth on their side. Even if they do, lack of contestation will encourage them to become complacent, arrogant, ignorant of the views of opponents."

Bible's apparent condemnation of homosexuality should be reinterpreted, why shouldn't he have the right to run for office within the Christian association and advocate for that view? When his name is kept off the ballot by current officeholders or by the guidelines of the national association, what we have is an oligarchic clique preventing open debate. You could say that the dissidents should break off and form their own group—"The Progressive Christian Fellowship of Tufts University welcomes gay members and officeholders," they could put on their poster—but it could also be said that it is the conservatives who want to restrict ballot access who ought to break off and form the splinter group. It's hard for me to see why a university should be constrained to set the rules so that the advantage lies with entrenched interests that want to thwart re-examination and revision. Within an institution dedicated to liberal educational values of reasoned debate, the rules should be tilted in favor of re-examination, criticism, and revision of belief.

Construed narrowly, some of these cases are about the right of student groups to exclude from leadership elections students who dissent from an orthodox interpretation of the group's ideological commitment. I'm not sure that freedom of expression on college campuses has anything to do with defending that kind of traditionalistic, backward-looking view of what groups stand for.

4. Chai R. Feldblum

Chai R. Feldblum is professor of law and director of the Federal Legislation Clinic at Georgetown Law Center. Her areas of work include disability rights and lesbian and gay rights. Among her published articles is "A Progressive Moral Case for Same-Sex Marriage."

That was a masterful Trojan Horse presentation, Stephen. You began by saying very clearly that you think these groups should have the right to decide the principles around which they associate—but once you're through the gates, you want to bring in liberal principles that are, of course, really contrary to religious principles. David French will tell you that religion is not a democracy; there are certain truths that cannot be changed.

This is not an easy issue. Its complexity is reflected in the diversity of views being expressed on this panel.

My first instinct, when I heard about these cases, was that the belief that homosexual conduct is immoral seems essential to the identity of an evangelical Christian, certainly much more than to the identity of a Boy Scout. To say that someone who rejects that position can be a leader of the group would be like saying that someone who doesn't believe in Jesus can be a leader. Although Tufts Christian Fellowship has no legal right against the

university, no First Amendment right since it's a private institution, suppose we apply the First Amendment principle of expressive association to this situation anyway. If one of the essential beliefs around which this group has come together is that homosexual behavior is immoral, then the only way the university should be allowed to trump that would be if the trumping were narrowly tailored to a compelling institutional interest. That's the legal principle. Usually people get to come together even in a way that discriminates against someone else, but the government can override the group's right to associate if the means it uses is narrowly tailored to a compelling government interest. My first instinct, as I said, was, "Let this group be! There should be diversity! More speech is better than less speech!"

But now I think the case is more complicated. In preparing for this discussion, I forced myself to think about the other side, why in fact the Tufts student judiciary could be right in de-funding and de-recognizing the group—assuming, of course that they do it properly next time; we all agree that there was a procedural due-process problem before.

I grew up as a very Orthodox Jew. I come from a long line of well-known Orthodox rabbis, who probably wouldn't want to hear what I'm about to say. But I grew up believing that every word in the Bible was divine. We kept every commandment in the Bible except those that were related to the Temple—because we don't have the Temple anymore—and those that were related to judicial remedies. The evangelical Christian groups say, "We need to do this because we believe every word of the Bible." But as I understand it, they are not actually keeping every word in the Bible. They are not, for instance, refraining from eating pork or eating shellfish or mixing certain materials in their clothing. I think they have to be more explicit in saying that there is a certain view of sexuality in the Bible so important or so central that the prohibition against homosexuality takes precedence over other prohibitions, and they need to explain why that is so.

But let us assume that this is clear, and that, as InterVarsity chaplain Jody Chang said in a letter to the Tufts daily paper, "our understanding of Scripture on this issue is that an active homosexual practice does not express God's intentions for human sexuality." Now, I don't think this comes out of hate. It is a perfectly reasonable religious belief that active homosexual conduct "does not express God's intentions for human sexuality." In response to that, Ms. Catalano says to the *Boston Globe*, "I'm not challenging their right to hold their beliefs, nor am I challenging their freedom of association. But I don't think pulling their recognition or funding violates either of those two constitutional rights. [Forget "constitutional," which doesn't apply.] They can still hold their beliefs and hold

their meetings, but Tufts has the right to say, 'No, we will not fund you because you're in violation of university policy.'" So that's the counterargument.

Now this religious belief held by the group is, I think, definitely contrary to the university policy that you may not discriminate based on sexual orientation. It does require the group to discriminate against someone who is gay and who thinks it is fine to be gay and engages in gay conduct. I think it's a disingenuous and flawed argument to say, as some have done, "Oh, we're not discriminating on the basis of sexual orientation, because we let gay people join. We're just discriminating on the basis of homosexual conduct." This is the rule of the U.S. military right now: you can be gay; you just can't engage in any gay conduct. When I tried to explain this in speaking about Clinton's compromise to a group of people in 1994, a rabbi said to me, "I get it. You can be gay, but you always have to have a headache" (and so, never have sex). To those of us who are gay, this seems like a really poor way of living one's life. I think that when the policy says you can't discriminate on the basis of sexual orientation, that means you can't discriminate against someone who is gay, the status, or against someone who thinks that engaging in the conduct is fine. So I think the religious belief held by the group—which is that being gay is okay but engaging in gay conduct is sinful and you should be trying to overcome it—is contrary to university policy.

Also, it's not necessarily a benign position toward people who are gay to say that it's okay to be gay (sexual orientation is given by God) but your responsibility is to struggle against that. An article in the Tufts paper by a student says, "InterVarsity [which is the umbrella evangelical Christian group] supports the emotionally destructive principle of self-loathing when it comes to homosexual attractions, and encourages students like Catalano to pray for a miracle—the full-fledged conversion from homosexuality to heterosexuality. Catalano has been suicidal and depressed because of the 'guidance' and 'direction' InterVarsity provided. Catalano's public telling of these events brought tears to the eyes of those present." This, I believe, is a really key point. To the religious group, this is not an "emotionally destructive principle of self-loathing." On the contrary, it is a principle of love and redemption. But it is a principle of love and redemption *only if the underlying view of the religious group—that sex between people of the same gender is destructive to the individual and to the fabric of society—is true.* If your underlying view is different, if you believe as I do that sexuality is a wonderful thing (and if I believed in God I would say it is a wonderful thing given by God), that for some people sexuality can best be expressed with a person of the same gender, and that this is a wonderful, life-affirming experience, then the teaching of these religious

groups is not loving and redemptive at all but destructive.

As I see it, then, here are the three key points: (1) It is a sincerely held religious belief on the part of an evangelical group like Tufts Christian Fellowship that engaging in homosexual conduct is wrong and destructive; (2) this belief if carried out logically must conflict with the university's non-discrimination principle; and (3) it is a not a benign belief, if your worldview is different from that of the evangelical group. So what should we do?

There are at least three options, of which I am going to discuss only one. One option is that since it is a sincerely held religious belief, we will let it trump the university policy of non-discrimination. I think David pointed out this option. Stephen started out with it, and ended with it as well, but with a little twist. I think that if you say

To the religious group, this is a principle of love and redemption. But it is that only if the underlying view—that sex between people of the same gender is destructive to the individual and to the fabric of society—is true. If your underlying view is different, then the teaching is not loving and redemptive but destructive."

this you have to extend it more broadly, and say, for instance, that if Tufts Christian Fellowship had a rule that a person who married someone of another race couldn't hold a leadership position, this religious belief should trump the university policy. That's one option. A third option that I played with for a while but that I don't really think works is the Georgetown University lawsuit solution, which splits endorsement and funding.

The second option is the one I want to play out. It says: "Yes, it is legitimate to withdraw funding and recognition from a group like Tufts Christian Fellowship. Ordinarily, religious groups can hold any belief that they want. But if a belief is in direct conflict with the important university policy of non-discrimination, and if the only way to carry out that important policy is by not allowing certain discrimination to happen—that is, if the remedy is narrowly tailored to that important government interest—then the policy prevails over the belief."

When I say "important" I am obviously drawing an analogy to constitutional law, which, though not mandated here, is useful. For example, I noticed that in an opinion piece in *U.S. News and World Report* John Leo said, "Well, if this happened, scientific groups would have to accept flat-earth leaders, and the Hillel would have to have leaders who said the Holocaust never happened." No, there would have to be a *compelling* university interest in not discriminating against people who believe that the earth is flat or who believe that the Holocaust didn't happen. Be careful when people use the slippery-slope

argument. There has to be a compelling institutional interest at stake.

The best analogy, I think, is the Supreme Court's 1983 *Bob Jones University* case, which involved a sincerely held religious belief against interracial dating and marriage. The Supreme Court (quoting an earlier decision) said, "The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding government interest." In the case of *Bob Jones*, blacks could attend the university, but they were forbidden to date outside their race. "That government interest [in eradicating racial discrimination] substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs." The school could exist; it could hold its beliefs and enforce its rules; it just could not get the benefit of the tax exemption. Tufts Christian Fellowship can exist; it can promote its views and enforce its rules; it just doesn't get the benefits of official school recognition.

What I found especially illuminating in the *Bob Jones* case is the concept of recognition. The Court said, "When the government grants exemptions . . . all taxpayers are affected; the very fact of the exemption . . . means that other taxpayers can be said to be indirect and vicarious 'donors.' . . . [T]o warrant exemption . . . an institution must . . . demonstrably serve and be in harmony with the public interest. The institution's purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred." Giving that exemption is, in fact, a support for the institution. The Court also said, "[I]t cannot be said that educational institutions that, for whatever reasons, practice racial discrimination, are institutions exercising 'beneficial and stabilizing influences in community life' . . . or should be encouraged by having all taxpayers share in their support by way of special tax status." That's the reasoning.

In the case of Tufts Christian Fellowship, there is no doubt that the view in question is a sincere religious belief, or that, given the worldview held by the group, it is a loving and redemptive belief about gay people. There is also no doubt that, given an alternative worldview—that engaging in gay conduct is either morally neutral or morally positive—the TCF belief is denigrating to the individual and undermines a compelling institutional policy of non-discrimination. Given that reality, I concede the legitimacy of the university's saying: In this narrow set of circumstances, in view of our compelling university policy, we will not provide funding to a group that we feel undermines that policy.

Now, as I said in the beginning, my complete view has various complexities and nuances, and I hope we get to some of these in the general discussion. I think that having this conversation is in fact the most key piece. As

Stephen said, and I have written along the same lines, it is important to deal with issues of morality. I myself think that the moral view that homosexuality is immoral is wrong; other people think it's right. We need to discuss it. And we need to hope that what we stand for as a country, not just as a movement, will be reflected in how we resolve some of these issues.

5. William A. Galston

William A. Galston is a professor in the School of Public Affairs at the University of Maryland. During the first two years of the Clinton administration he served as deputy assistant to the President for domestic policy. He is the author of Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State and a founding co-editor of the journal The Responsive Community.

As my predecessors on this panel have said, this is not the sort of legal or constitutional case where an easy invocation of the First Amendment can get us very far. Nor can some of my favorite ideas of freedom of association and expressive liberty get us very far, because, as others have pointed out, this is, in a sense, a case of association versus association.

So how do we think about it? I agree with Professor Feldblum that it is interesting intellectually to conjure with legal analogies. But I also agree that this is not ultimately a legal question. It is a policy question, a moral question, a human question, a question of social theory. I think that is why we're all finding it so difficult to get a firm intellectual handhold on the issue.

Here is how I would try to argue my way towards a resolution. I asked myself three questions: (1) What does it mean to be a member of a strong group, a group whose intellectual spine, whose structure of internal authority, is constituted by a rigorous and well-thought-out system of belief? (2) What does it mean to be a private secular university? (3) What does it mean to be a private secular university operating in a free society with the knowledge that one's policies will have consequences for that society over time? These three questions are not about individual identity so much as social or institutional identity.

First, what does it mean to be a member of a group based on a rigorous system of belief? I'm going to say something that in light of Professor Feldblum's remarks may sound harsh and unfeeling, but in doing so I invoke the authority of a political thinker who was anything but harsh and unfeeling, the late, lamented Sir Isaiah Berlin. It is very likely, he pointed out, that the moral universe is structured so that not all the things we regard as good go together in one package. You cannot create a way of life individually or associationally or as a political com-

munity such that everything you consider good fits within one course of action. Suppose you understand your identity in a particular way and also place great value on membership in a group that has a very different normative view of your declared identity. It does not follow that the group is under any moral obligation to change its basic moral architecture in order to accommodate you. It is the case for most groups—not Judaism, granted—that nobody has drafted you into them. You have freely chosen to be a member of the group. If the group challenges something that is fundamental to your identity, then you may dissent and you may leave, but you cannot claim as a matter of moral right that the group must readjust itself to conform to your individual sense of your life's meaning and purpose and worth. You cannot. The idea of membership in a strong group is that a locus of authority and normative standards exists outside your own consciousness.

And so, while I am sympathetic to the proposition that a group position ought to be arrived at thoughtfully, I am unsympathetic to the proposition, which I attribute to Professor Macedo, that a strong group has no right, even within a liberal university, to define a belief structure, adherence to which would be a necessary condition for leadership within the group. To me, that makes about as much sense as for someone to say to a President-elect, "Oh, by the way, I'd like to be your Secretary of Education but I don't believe in your education policy." The President-elect would be perfectly justified in saying, "You are a wonderful human being and a great leader and a great American, but what you have said disqualifies you from leadership in my administration." That's not invidious discrimination. That is the kind of distinction that makes the integrity of collective action possible.

Question number two: What does it mean to be a secular private university? I found it illuminating that Professor Feldblum more than once used the language of legitimacy in referring to what one would say to Tufts in following the course of action she was playing with intellectually but not quite endorsing. (Sort of the reverse of the Trojan Horse principle: you never enter the gates in the first place.) From a legal or quasi-legal standpoint, Tufts has a right to do what she recommended, but we would nonetheless wonder whether it would be *right* for Tufts to do what it has a right to do. There is a gap between rights and rightness. How do we fill that gap when we're thinking about an institution, particularly a secular private institution such as Tufts? Here I associate myself with Professor Macedo: one would certainly think that if John Stuart Mill's argument in favor of a robust marketplace of ideas applies anywhere it should apply to a secular private university. The presumption should be in favor of the argu-

ment that a violation of the Millian principle—for whatever reason—within a secular private university has a heavy burden of proof to discharge. Given the facts as they have been presented, I think it would be difficult to say that Tufts discharged that burden of proof.

Let me hasten to purposive language. What happened as a result of the way Tufts proceeded? Well, first of all, it sent a message that there was nothing in the views of Tufts Christian Fellowship worth investigating, worth learning about. Their view in this matter is wrong and to be ruled out, period. This unreflective point of departure led to the unreflective, non-deliberative process that David French described. Thoughtlessness does not have a place in a university. Thoughtlessness, I believe—and this would be a much longer argument that I will truncate—diminishes the dynamic of university life, considered both as an intellectual process and as a preparation for citizenship in a liberal society. In a university context, how do we learn to reason about which differences are to be overridden and which allowed? How do we go through that process of collective deliberation and social learning? Surely not in the way that Tufts acted. Surely not. I see a fundamental tension between the purposes of the university and what actually transpired at Tufts.

Third and finally, and here I will be very brief: Let us suppose not only that this university consistently proceeded as it did in this case, but that all other secular private universities did so as well. What would be the expected consequences of that behavior over time? I would submit to you that probably within a decade, and certainly within a generation, most of the many tens of millions of young Americans whose views are pretty close to those of the members of Tufts Christian Fellowship would experience such a chilled atmosphere within these universities that they would leave them. They would sort themselves out into universities constituted on more homogeneous principles, because those principles are the only ones that provide an accommodating framework for their lives as students and as believers. Would it be a good thing for America over time if, as a result of the imposition of an orthodoxy—which I consider an excessively expansive and unnuanced view of non-discrimination—that kind of sorting took place and the already attenuated dialogue between those on the two sides of the barricades broke down altogether? I think not.

"If John Stuart Mill's argument in favor of a robust marketplace of ideas applies anywhere it should apply to a secular private university... A violation of this principle has a heavy burden of proof to discharge."

DISCUSSION

Timothy Abrams: Thanks to all our panelists, who, as we had hoped, presented a diversity of views and helped get the discussion of this important issue going on a high level. Others are invited to join in. [These participants will be identified at the end.]

Nigel Ashford: Professor Galston, would you comment on Stephen Macedo's point that there should be no exception for religious groups, that the rules should apply equally to religious and secular organizations?

William Galston: If this were a constitutional matter, I would argue that there is indeed a certain preferred status for religion. But we have all agreed that in the university context this is not a case that is resolvable—even by analogy—on the basis of constitutional reasoning, and so my instinct is to agree with him. I don't think this is simply a case about religious liberty. It is a case posed by a group with a sincere, reflective, well-developed worldview, sustained and endorsed over time, that dissents from a general proposition enunciated as binding by the university authorities. We're not talking about time, place, and manner issues here; everybody agrees that the university may speak with regard to those. So while this may have started as a discussion of the expressive liberty of religious groups, I think it's a broader issue than that. I agree with Stephen on that point.

Chai Feldblum: The principle of freedom of expressive association applies whether the association is based on a religious belief or any other kind of belief. I think the issue of making an exception for religious groups comes up more when such a group

asks for special accommodations. Recent examples are the Religious Freedom Restoration Act and the Religious Liberty Protection Act. Some would ask, why should a religious day-care center be treated better than a secular day-care center?

Personally, while I have some concerns about these laws, I do feel that there is something different about a religious belief compared to a secular belief. Having grown up religious, I know that it isn't possible simply to change a belief, and so I have not been sympathetic to the view that there should be no greater protection for religious belief than for other kinds of belief. However, I don't believe there should be accommodations contrary to a compelling government interest.

Hadley Arkes: I agree that this isn't a First Amendment issue, but if there are principles behind those passages in the Constitution, they'll be engaged even on the side of private entities.

Let me do a little riff on Justice Sutherland's argument in the 1937 case *Associated Press v. National Labor Relations Board*. Let's suppose we have a pro-choice journal. We understand that it is legitimate to hold a pro-choice position, and we understand that it must be legitimate for people to associate to preserve that position. Furthermore, the right to have the association must entail the right to preserve the integrity of the association. If suddenly the editor were to defect and become pro-life, it would not be a violation of the First Amendment to remove that person from a position of leadership. For that person would be free to find a job, and publish her views, in other settings, with other organizations, more compatible with her views. She would

not be barred by law from holding those views or publishing them. It would be a violation of the First Amendment if the government sought to protect her right not to suffer discrimination by preserving her position on that journal. For that would now be an attempt by the government to interfere, *by law*, with the freedom of people to preserve the integrity or character of their association, directed to legitimate ends.

In the case of Tufts, if the leader of a gay-rights group suddenly underwent a religious conversion and entered therapy and the group decided to remove her or him from leadership, could that person claim to be suffering from discrimination based on sexual orientation? Could she appeal to the same rules at Tufts? I think certain axioms come into play. Tufts could have it any way it wanted: it could require the students to speak Latin and hop on their left legs. The same principles that would preserve the integrity of a gay-rights group or a pro-life group should preserve the right of Tufts to do it its way. And a Catholic school could certainly refuse to endorse a gay-rights group or a pro-choice group on campus. It's simply a matter of truth in advertising. But what Tufts actually did was to send precisely the message Bill Galston described, that this campus recognizes no legitimacy for orthodox Christian and Jewish groups. That is quite an inversion from the character of institutions like Tufts at the beginning.

Patricia Logue: It's interesting that Professor Arkes used the phrase "truth in advertising." That phrase appears in our brief for the Boy Scouts case. A starting point for the universities, as well as for the Boy Scouts,

might be this: If an organization claims exemption from a non-discrimination policy because of a core belief, then, because of the value we place on that non-discriminatory principle, it is incumbent upon the organization to make explicit its desire to depart from it. When you form your organization you have to say, "We believe this about race, or gender, or sexual orientation, and we do not intend to abide by that particular university policy."

Now, that wouldn't change what Tufts is free to do, but it at least would help to clarify the marketplace by making explicit what the organization stands for. Certainly in the expressive-association context you should be able to point to a long-standing belief in a discriminatory principle; you should be able to say that you have always stood by that belief and that it is a mainstay of your organization. I don't know whether Tufts Christian Fellowship would pass that test or not. Some of its materials seem to suggest that it wouldn't, but David French has articulated a somewhat different view of the situation.

Keith Pavlisnek: Does everyone on the panel agree with Hadley Arkes that religious colleges would have the right to exclude gay groups from official campus recognition?

Chai Feldblum: What would be the problem? If a private institution in a jurisdiction that does not have a gay-rights law says, "Our policy is that homosexuality is immoral and murder is immoral, and so we will not recognize the gay student group or the Future Serial Murderers of America group," what would be the problem with that?

Stephen Macedo: But suppose the jurisdiction does have a non-discrimination ordinance. Then the question becomes the legitimacy of applying

such an ordinance to a religious campus. I think that some of these issues are going to come up in the school voucher cases. In Milwaukee and Cleveland, can the state refuse to allow religious schools that are receiving vouchers to exclude people who don't accept the school's religious views? Can the schools expel children who don't agree to take part in the religious exercises, the prayers and so on?

I think it is permissible for a government to decide that it wants, as a public matter, to promote a liberal education and that such an education entails a critical engagement with various views. And I think that a university campus, as a matter of liberal principle, is a place where people are required to defend their beliefs. In their churches, they may prefer to defer uncritically to received authority, but I think a campus should tilt in the direction of requiring those groups that seek recognition as campus groups to offer reasons for their beliefs, to engage in criticism, to be open to challenge. That's what a liberal education is about!

I would not go along with Chai's apparent view that the ultimate liberal commitment is to be equally respectful of all sincerely held world-views. If that's the case, then there's no such thing as truth. If that view is right, then it would be impossible to defend a liberal education oriented around the critical, reasoned pursuit of truth against the alternative and deeply antithetical idea of education as indoctrination into a predetermined set of fixed truths.

Chai Feldblum: I agree with you on that view of liberalism. I also say that for a religious institution in a jurisdiction that has a non-discrimination law, I think the result should be like the one in the Georgetown University case, where the institution is not required to endorse the group but is required to give all the tangible benefits.

to Guinness. Professor Macedo, the InterVarsity Christian Fellowship has a very good track record of defending its worldview with highly persuasive reasons. If I may say so, it was your speech that was dripping with what you called unreasoned prejudice. You described religious groups as "traditionalistic" and "backward-looking," as "entrenched interests that want to thwart reexamination." In fact, you will find many religious people happy to engage you on a deeply rational level.

Stephen Macedo: I accept that. I was trying to be provocative.

William Galston: Professor Macedo, I wasn't quite sure what your answer to a previous question was, so let me raise it again. Let us suppose that we're talking about a Catholic school (characteristic number one) in a jurisdiction that has no non-discrimination ordinance (characteristic number two) and that this Catholic school is not entangled with government through the receipt of material benefits in such a way that conditions may be attached to those public benefits (characteristic number three). It is simply a rigorously Catholic institution that adopts various sorts of restrictive policies with regard to the sorts of student associations that may even function within its bounds. Would any instrumentality of government be within its rights to say, "What you are doing is contrary to federal or state or county public policy as we define it, and you must change"?

Stephen Macedo: I would never say "you must change." But I might say "you might lose certain government benefits." Of course, they have the right to freedom of association. But the real issue becomes government aid. There are many forms of government aid to education, and I am not prepared to say that all of these forms of aid must be made available on a

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neutral basis to, for example, educational institutions that accept and others that reject the substantive values of liberal education that government policy should promote. It is not a question of discriminating against religious institutions. A secular institution that's ideologically committed, that has certain built-in philosophical or moral conclusions that it has not dealt with critically, might not be regarded as an institution entitled to all the public benefits available to others more fully committed to a liberal education.

William Galston: Then we're all in danger.

David French: I'm probably the only person on this panel who went to a fundamentalist Christian college, one that prided itself on being—although not racially discriminatory in any way—more conservative than Bob Jones. And I then went to Harvard Law School, so I had a completely diverse educational experience. A point that really resonated with me was this notion of what Hadley Arkes called truth in advertising. Say what you're about and be that. Let's say I was going to go to Harvard Law School and planned to join the Harvard Law School Christian Fellowship. That organization meant a lot to me while I was there; had it not been permitted to exist, I would have wanted to know that before I decided to dump \$35,000 per year into the institution. One of the problems we had at Tufts was you could read through the university handbook and nowhere find the notion that Tufts Christian Fellowship as it was constituted could not exist. That's a real issue. Tufts has the freedom to create a place where gay rights are respected to the extent that a group like TCF is not going to be welcome. I would protect its right to do this. But say that. Be explicit about that, so that students know before they enroll what they're getting into.

Hugh Beard: Professor Feldblum, is not a secular university that has an orthodoxy essentially a religious organization? The definition of religion is a worldview. Tufts has a worldview, even though it is not "Christian." Is this not still a religious organization?

Chai Feldblum: That denigrates religion, which I think is different from simply a strong belief. But there is no doubt that any institution is going to have moral beliefs. What I never got about liberalism, what never made sense to me, was that liberalism is about complete neutrality—because there is no such thing! Governments and institutions all take moral positions, even if they cast them in terms of equality. Tufts has taken a moral position by saying that you should not discriminate on the basis of sexual orientation; it has not said that you should not discriminate on the basis of whether a person is or is not a murderer. That's making a moral distinction; it's saying that we think being a murderer is morally bad and being gay is not morally bad. That's a major moral statement, even though liberals never say they are making moral statements when they pass non-discrimination laws.

So Tufts has this worldview. Now there are two things it can do. It can say, This worldview is so important that we cannot accept TCF; its position so undermines the individuality of gay people that it would be too problematic. Or Tufts could say, We don't agree with the TCF position, but we think it is important to have alternative views represented. I don't think the world generally has gotten to the point of understanding that gay people are morally equivalent to heterosexual people. People have come to see that being gay doesn't necessarily mean being wrong, but they haven't gotten to the point of seeing homosexuality and heterosexuality as morally equivalent. How are we ever going to get to that position if we

don't have a dialogue? So for Tufts not to welcome people who believe differently is probably, in the long run, problematic for equal rights for gay people.

Patrick Fagan: Let's push the issue a little further on the standing of not just evangelical Christian groups but orthodox Jews or Muslims. Chai Feldblum's argument would lead, I think, to the conclusion that it is okay for Tufts to accept orthodox Protestants, Catholics, Jews, and Muslims as individuals but to refuse them the right to associate freely as other groups do. Am I correct?

Chai Feldblum: That would be a poor policy choice. I presented the position of the right of Tufts to do this; that's different from whether it's a right policy for Tufts to take.

Patrick Fagan: That's what I want to nail you on. Is that a good policy?

Chai Feldblum: I think it's tough. I recently gave a speech in Seattle entitled "Gay Rights in 2000: Law, Morality, and Politics" to a very pro-gay group. I began the speech by recounting the facts of the Tufts case, and then I asked, "How many people here think that the Tufts student government was right to revoke the standing and funding?" About half of the people raised their hands. Then I asked, "How many think it was wrong?" About half again. Then I said, "Suppose the facts were different. What if this group thought people who are black are inferior and this girl Julie found out she was half black. She was therefore barred from seeking a leadership position. Would the student government have been right to withdraw the funding?" Almost everyone raised their hands to agree.

It seems to me that race is in a different situation in this country than sexual orientation. Our views about

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sexual orientation are still in process, and people still have strong religious beliefs that homosexuality is immoral. That's why I think the better policy decision should reflect where the country is and require more dialogue, not the heavy hand of regulation.

Keith Pavlischek: A question for the whole panel: What advice would you give to a Tufts administrator or a member of the student judiciary who will have to make a decision in the TCF case this coming fall?

Stephen Macedo: I actually don't think this is a very hard case. If Millian principles don't apply on a university campus, if they don't apply to these groups that have treated the homosexual student very respectfully while advancing a moral view that is not just sincere but grounded in tradition, I would be very surprised. As I say, I think that this group should be respected and treated as a legitimate student expressive association. I do think there are issues about other ways in which a university constitutes itself with respect to the value of critical reason; perhaps on other issues the university environment will not be neutral toward traditionalistic religious groups of various sorts. I don't think the university needs to bend over backwards to be neutral toward groups that don't believe in reasoned evidence and do believe in deferring to authority. Such groups should be recognized and respected, but we should also encourage them to argue about their commitments.

Patricia Logue: There has to be room for more speech and more diversity

of views. It annoys me to read op-eds that group what happened at Tufts, and Dr. Laura, and the Boy Scouts together as evidence that "gays are in favor of censorship." That's ridiculous. But I know that going way down this road of enforcing equality provokes polarization rather than dialogue, and that is ultimately not to the good.

Extending the equality principle to sexual orientation, as Tufts and others have chosen to do, is extraordinarily important, and it is appropriate for Tufts to impose a very heavy burden on any group that seeks an exemption from that principle. I've discussed some of the questions that the university might look into in determining whether a group that claims to be an expressive association should be allowed to get a free ride when it comes to discrimination in one form or another. It should be possible, but it should be rare. I'm not sure whether it should have been allowed in this case; I continue not to take a position on that. But I think what has happened to Tufts Christian Fellowship is troubling.

William Galston: I think that Tufts made a mistake. And I hope it seriously reconsiders that mistake, and in doing so asks itself how it got there. That is to say, if there is really a conflict between the very expansive non-discrimination principle that the university has enunciated, on the one hand, and the ability of the orthodox of various faiths to associate on that campus in terms that they can recognize as being true to their beliefs and their collective—not just their individual—identity, then Tufts should

ask itself whether a principle drafted so expansively should stand. In my global view, the warp and woof of Western civilization are *secular-rational philosophy and revealed religion*. It would be a shame if an institution such as Tufts, in an effort to make the world very safe for one, made it entirely unsafe for the other. I believe the internal dialogue of the university would be much richer if both were present on honored terms.

Finally, I am disturbed by the unreflective processes of the university. I don't think that unreflectiveness was an accident. I hope the university at the very least seizes the opportunity to define this incident as a quintessentially teachable moment, and that rather than invoke closed-door processes, it tries to engage the minds and the passions of its students around this issue. That is the only way in which a genuine deepening of experience and thought can occur.

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